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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

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OCT 17 2016

SC Court of Appeals

Opinion No. 2016-UP-261(S.C. Ct. App. filed June 8, 2016)

Samuel T. Brick,

Petitioner

v.

Richland County Planning
Commission and Fairways
Development, LLC, Intervenor

Respondents.

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OCT 18 2016

S.C. SUPREME COURT

RETURN TO PETITION FOR
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QUESTIONS PRESENTED

1. IS THERE ANY REASON FOR THIS COURT TO EXERCISE ITS DISCRETION TO REVIEW AN UNPUBLISHED PER CURIAM OPINION BY THE COURT OF APPEALS?
2. DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S DISMISSAL OF PETITIONER'S APPEAL FOR FAILURE TO TIMELY JOIN THE DEVELOPMENT PERMITTEE AS A NECESSARY PARTY AS REQUIRED BY THIS COURT'S PRECEDENT IN *SPANISH WELLS*?
3. DID THE COURT OF APPEALS ERR IN REJECTING PETITIONER'S COLLATERAL ESTOPPEL ARGUMENT WHEN THAT ISSUE WAS NOT PRESERVED FOR REVIEW AND LACKS MERIT?
4. DID THE COURT OF APPEALS ERR BY NOT CONSIDERING PETITIONER'S REMAINING ISSUES AFTER DETERMINING A PRIOR ISSUE WAS DISPOSITIVE?

STATEMENT OF THE CASE

On November 7, 2012, Fairways Development, LLC ("Fairways") submitted an application and sketch concept plan for a project, known as "The Villages at LongCreek," to the Richland County Planning and Development Services Department for review and approval. (R.5, 43-46) After its submission, the application was approved by the Richland County Development Review Team ("DRT") at its meeting, which was held on November 29, 2012. (R. 47-51) The Petitioner, Samuel T. Brick ("Brick") appealed the decision of the DRT to the Richland County Planning Commission on December 20, 2012. (R.5, 52-60)

The Planning Commission voted on February 4, 2013 to deny Brick's appeal. (R. 279-280) The Planning Commission issued its order on March 4, 2013. (R. 6, 66-69)

Brick filed an appeal with the Richland County Clerk of Court on March 18, 2013. (R. 32-69) The only party named by Brick in the appeal was Richland County Planning Commission (R. 7-8, 32). On June 5, 2013, the Planning Commission filed a motion to dismiss Brick's appeal because he did not have standing under the statute to appeal. (R. 70) On June 17, 2013, Fairways filed a motion to dismiss Brick's appeal based on Brick's lack of standing and Brick's failure to timely join Fairways, the development permittee, as a necessary party to the appeal. (R. 104) Fairways also filed a motion to intervene in the action because Brick failed to name it as a party to the appeal. (R. 85)

On June 27, 2013, Brick filed a motion to amend his appeal to add Fairways as a party and a "Notice of Defective File." (R. 99)

A hearing was held before the Honorable Judge DeAndrea Gist Benjamin on August 30, 2013. (R. 5, 165-(1)-198) At this hearing, Judge Benjamin granted Fairways' motion to intervene, denied Brick's motion to amend his appeal and took the motions to dismiss under advisement. (R. 187, 198) Subsequently, Judge Benjamin entered orders dated December 17, 2013 granting Fairways and the Planning Commission's motion to dismiss Brick's appeal for failure to join Fairways as a party to the appeal. (R. 5-12) Judge Benjamin denied Fairways and the Planning Commission's argument on standing. (R. 6-7, 10, and 12) Brick filed a motion to reconsider which was denied by form order dated and filed February 5, 2014. (R. 17) Brick timely served his notice of appeal from these orders on March 11, 2014, this appeal followed. On June 18, 2016, in

a three paragraph unpublished *per curiam* opinion, the South Carolina Court of Appeals affirmed the trial court's order. Brick filed a petition for rehearing which was denied and then filed the present Petition for Certiorari.

ARGUMENT

1. THERE IS NO REASON FOR THIS COURT TO EXERCISE ITS DISCRETION TO REVIEW AN UNPUBLISHED PER CURIAM OPINION BY THE COURT OF APPEALS.

Rule 242(b) SCACR provides, "A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. There are no special or important reasons to grant the petition in this case, as demonstrated by the Court of Appeals opinion being unpublished. The decision was unanimous and there was no dissent. The decision does not conflict with but was based on this Court's prior precedent. There are no federal questions or constitutional issues. This court should deny the petition and not review a unanimous, unpublished *per curiam* opinion.

2. THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT'S DISMISSAL OF BRICK'S APPEAL BECAUSE HE FAILED TO JOIN FAIRWAYS, THE DEVELOPMENT PERMITTEE AS A NECESSARY PARTY TO THE APPEAL.

The outcome of Brick's appeal is governed by this Court's precedent in *Spanish Wells Prop. Owners Ass'n, Inc. v. Bd. of Adjustment of Town of Hilton Head Island*, 295 S.C. 67, 69, 367 S.E.2d 160, 161 (1988) and the reasoning of the South Carolina Court of Appeals in *Friends of McLeod, Inc. v. City of Charleston*, 376 S.C. 610, 615, 658 S.E.2d 544,

546 (Ct. App. 2008)(*opinion vacated as moot* after certiorari granted because of an agreement of the parties 384 S.C. 438, 682 S.E.2d 488 (S.C. 2009)¹. In *Spanish Wells*, the South Carolina Supreme Court adopted the majority position that a development permittee is a necessary party to an appeal of its permit. *Id.* at 69, 367 S.E.2d at 161. The court affirmed the circuit court's dismissal of an appeal by the property owners association that failed to join the development permittee. In this case, Brick failed to join Fairways as a party to the appeal and therefore his appeal was properly dismissed.

While Fairways sought to intervene and was later added by the court on August 30, 2014, such intervention does not save Brick's defective appeal. As noted by the trial judge in her opinion, "*In Friends of McLeod Inc.*, the parties, by consent order, joined the necessary party to the appeal. However, in that case, the Court still found the appeal to be untimely because the appellant failed to join the necessary party within the statutorily required time to appeal. *Id.* at 613-15, 658 S.E.2d at 545-46." (*Emphasis Added*). (R. 8) "In order for the Appellant to have perfected his appeal to the circuit court, he would have had to join Fairways in the appeal by April 9, 2013. For this reason, the Court finds that Fairways' motion dismiss should be granted." (R. 8) Failure to timely join Fairways was jurisdictional and fatal to Brick's appeal. The Court of Appeals properly affirmed the trial court on this issue.

¹ As recited in brief, opinion cited for reasoning and not as binding precedent.

3. THE COURT OF APPEALS PROPERLY REJECTED PETITIONER'S COLLATERAL ESTOPPEL ARGUMENT BECAUSE THAT ISSUE WAS NOT PRESERVED FOR REVIEW AND LACKS MERIT.

The Court of Appeals properly denied the Petitioner's collateral estoppel argument because that argument was not ruled upon by the trial court and was not preserved for appellate review. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review.")

In any event, the argument lacks merit. Brick argues that because Fairways Development, LLC filed a motion to dismiss in a separately filed, FOIA case by Brick against Fairways and Richland County (R. 234) that Fairways is collaterally estopped from asserting that Fairways is a necessary party to his appeal from the Planning Commission. (Appellant's Brief, Argument 2) However, Brick is comparing apples and oranges. As noted by the Judge Alison Renee Lee in her order granting Fairway's motion to dismiss, the FOIA applies only to a public body, not a person such as Fairways, (2) there is no private cause of action against Fairways under the FOIA and (3) the Plaintiff has not alleged any violation of the FOIA by Fairways. (R. 20-21). Thus, Fairways' dismissal in that action has nothing to do with whether or not it is a necessary party as a development permittee in a separate appeal from the Planning Commission. Indeed, it's surprising that Brick even mentions the FOIA action because

it makes clear that, despite all his protestation in his brief to the contrary, Brick always knew Fairways was the development applicant and should have been a party to his appeal.

In paragraph 6 of Brick's complaint (filed in the FOIA act case on October 31, 2012 and prior to his appeal), Brick alleges that Fairways Development, LLC applied to the Richland County Planning and Development Services Department for development of approximately 100.7 acres under section 26-186 of the code. (Emphasis added). (R. 236). In a motion to amend those same pleadings on January 9, 2013 (again prior to his appeal), Brick states, "...Defendant Fairways Development LLC is included as a vested party of interest only." (Appendix to the Record on Appeal, 4)

In his final order granting Richland County an involuntary dismissal after Brick's case in chief on the FOIA case, Judge Roger M. Young, Sr. notes, "...each of the alleged violations of FOIA asserted by the Plaintiff pertain to a development application submitted by Fairways Development, LLC ("Fairways") regarding the proposed development of a parcel of land in Richland County. (R. 24)

Brick's argument about collateral estoppel lacks merit, he is comparing apples and oranges, and the FOIA action shows that Brick knew prior to his appeal Fairways was the development applicant with a "vested interest".

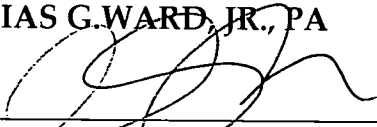
4. **SINCE THE COURT OF APPEALS DETERMINED THE TRIAL COURT PROPERLY DISMISSED BRICK'S APPEAL FOR FAILING TO NAME THE DEVELOPMENT PERMITTEE, IT WAS NOT NECESSARY FOR THE COURT OF APPEALS TO CONSIDER BRICK'S REMAINING ISSUES.**

As noted previously, the Court of Appeals properly affirmed the trial courts' dismissal of Brick's appeal for failure to timely add the development permittee as a party to the appeal. Therefore, it was not necessary for the Court of Appeals to consider the Petitioner's other, somewhat convoluted issue about interpreting and applying a local government ordinance. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not address remaining issues if the determination of a prior issue is dispositive).

CONCLUSION

There are no special or important reasons for this court to grant the petition to review the unpublished *per curiam* decision of the South Carolina Court of Appeals. The Court of Appeals properly affirmed Judge Benjamin's order dismissing Brick's appeal on the dispositive issue of Brick's failure to timely include the development permittee as a necessary party to the appeal. For these reasons, the reasons set forth in the trial court's order, the Court of Appeal's order, the Respondent Fairway's and Richland County's briefs and their respective Returns to the Petition for Certiorari, the petition should be denied and the remittitur issued.

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Dated: _____

10-13-16

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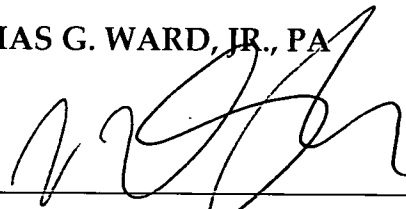
I certify that I have served a copy of the Respondent Fairways Development, LLC's Return to Petition for Writ of Certiorari on all parties, by depositing the same in the United States Mail, postage prepaid, on October 13, 2016, addressed as follows:

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